Supreme Court, U.S.
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No. ___

In The

Supreme Court of the United States

October Term, 1994

BARRY P. DAVIS,

Petitioner,

v.

TEXACO REFINING AND MARKETING, INC.,
a Delaware Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Alexis I. Crow
Counsel of Record
Anne-Marie Amiel
THE RUTHERFORD INSTITUTE
1445 E. Rio Road
Charlottesville, VA 22901
(804) 978-3888

Davis S. Shannon
Thomas P. Walsh
SHANNON, JOHNSON & BAILEY, P.C.
575 Lloyd Center Tower
825 N.E. Multnomah Street
Portland, OR 97232-2154
(503) 232-3171

March 29, 1995

Balmar Legal Publishing Services, Washington, D.C., (202) 682-9800

QUESTIONS PRESENTED

1. WHETHER A FRANCHISEE WHO IS IN COMPLIANCE WITH EXISTING CLAUSES IN HIS FRANCHISE AGREEMENT MAY HAVE HIS FRANCHISE TERMINATED FOR REFUSING TO COMPLY WITH DEMANDS BASED ON CHANGED POLICIES OF FRANCHISOR, WHEN TO SO COMPLY WOULD VIOLATE HIS CONSTITUTIONALLY PROTECTED RELIGIOUS BELIEFS.

2. WHETHER A JUDICIAL ORDER REQUIRING FRANCHISEE TO VIOLATE HIS RELIGIOUS BELIEFS MAY VALIDLY BE ISSUED WITHOUT REVIEWING ALL THE EVIDENCE OFFERED BY BOTH PARTIES.

LIST OF PARTIES

The parties to the United States District Court for the District of Oregon and the United States Court of Appeals for the Ninth Circuit were Barry P. Davis and Texaco Refining and Marketing Inc., a Delaware Corporation.

TABLE OF CONTENTS

	PAGES
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
I. WHERE A FRANCHISEE COMPLIES WITH EXISTING CLAUSES IN FRANCHISE AGREEMENTS, HIS FRANCHISE MAY NOT BE TERMINATED FOR REFUSAL TO COMPLY WITH DEMANDS BASED ON NEW POLICIES OF THE FRANCHISOR, WHEN TO SO COMPLY WOULD VIOLATE HIS CONSTITUTIONALLY PROTECTED RELIGIOUS BELIEFS.	5
(1) Whether a term of a franchise agreement is fundamental to the franchise relationship and is reasonable is a question of fact, not to be decided on summary judgment.	6
(2) Respondent did not meet its statutory obligations to provide proper notice of termination under the Petroleum Marketing Practices Act, and any claim for damages is therefore not moot.	8

II. WHERE A JUDICIAL ORDER REQUIRES A FRANCHISEE TO VIOLATE HIS RELIGIOUS BELIEFS, IT MAY NOT VALIDLY BE ISSUED WITHOUT REVIEWING ALL THE EVIDENCE OFFERED BY BOTH PARTIES. 11

(1) The District Court abused its discretion when it granted injunctive relief to Respondent. 11

(2) The substantial cooperation between the State and Respondent requires Respondent to protect Petitioner's constitutional rights under the First and Fourteenth Amendments. 14

CONCLUSION 17

TABLE OF AUTHORITIES

CASES	PAGES
Avramidis v. Arco Petroleum Products Co., 798 F.2d 12 (1st Cir. 1986)	10
Blankenship v. Atlantic-Richfield Co., 478 F.Supp. 1016 (D. Ore. 1979)	9
Doebereiner v. Sohio Oil Co., 880 F.2d 329, *amended*, 893 F.2d 1275 (11th Cir. 1990) . .	7-8
Edmonson v. Leesville Concrete Co., 111 S.Ct. 2077 (1991)	16
Flagg Bros. v. Brooks, 436 U.S. 149, 154 n.3, 98 S.Ct. 1729, 1732 n.3., 56 L.Ed.2d 185 (1978)	11
Greco v. Guss, 775 F.2d 161 (7th Cir. 1985)	16
Hanes v. Mid-America Petroleum, Inc., 577 F.Supp. 637 (W.D. Mo. 1983)	6, 10
Harbor Chevrolet v. Machinists Local Union 1484, 173 Cal.App.2d 380, 343 P.2d 640 (1959) . .	12
Harris v. City of Roseburg, 664 F.2d 1121 (9th Cir. 1981)	16
Howerton v. Gabica, 708 F.2d 380 (9th Cir. 1983) . .	15
Khorenian v. Union Oil Co., 761 F.2d 533 (9th Cir. 1985)	12
Marathon Petroleum Co. v. Pendleton, 889 F.2d 1509 (6th Cir. 1989)	9
Moody v. Amoco Oil Co., 734 F.2d 1200 (7th Cir. 1984), *cert. denied*, 469 U.S. 982, 105 S.Ct. 386, 83 L.Ed.2d 213	12
Naff v. Standard Oil Co., 527 F.Supp. 160 (SD Ohio 1981)	11

CASES	PAGES
Nassau Boulevard Shell Service Station, Inc. v. Shell Oil Co., 875 F.2d 359 (2nd Cir. 1989) . .	8, 11
NCAA v. Tarkanian, 109 S.Ct. 454 (1988)	15
Romero Rodriguez v. Esso Standard Oil Co., 636 F.Supp. 615 (D. P.R. 1986)	9
Saad v. Shell Oil Co., 460 F.Supp. 114 (E.D. Mich. 1978)	8
Serianni v. Gulf Oil Co., 662 F.Supp. 1020 (E.D. Pa. 1986)	7
Smoot v. Mobil Oil Corp., 722 F.Supp. 849 (D. Mass. 1989)	9
Sternberg v. Checker Oil, 573 F.2d 921 (6th Cir. 1978)	13
Trans International Airways, Inc. v. International Brotherhood of Teamsters, 650 F.2d 949 (9th Cir. 1980)	11
Union Oil Co. v. O'Riley, 226 Cal. App. 3rd 199, 276 Cal. Rptr. 483 (1990)	10-11
Wisser Co. v. Mobil Oil Corp., 730 F.2d 54 (2nd Cir. 1984)	9-10

STATUTES AND CONSTITUTIONAL PROVISIONS	
15 U.S.C. § 2801 *et seq.*	3, 6, 8-13, 17
42 U.S.C. § 1983	5, 15
United States Constitution, Amendment I	2, 4, 14
United States Constitution, Amendment XIV . . .	2, 4, 14

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The United States District Court's Opinion and Order granting the preliminary injunction, entered May 7, 1993, appears at Appendix A below. The United States District Court's Order denying a stay of the preliminary injunction, entred May 7, 1993, appears at Appendix B below. The United States District Court's Order denying Petitioner's application for a temporary restraining order appears at Appendix C below. The Order of the District Court granting Respondent's motion for summary judgment, entered October 20, 1993, appears at Appendix D below. The Memorandum Opinion of the Court of Appeals for the Ninth Circuit, dated December 29, 1994, appears at Appendix E below.

JURISDICTION

This case seeks review of a decision of the Court of Appeals for the Ninth Circuit entered on December 29, 1994. This is a civil case.

Jurisdiction for review of this matter by certiorari is conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . .

United States Constitution, Amendment XIV

[N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

At various times between 1976 and 1990 Petitioner, a convert to 7th Day Adventism, had agreed to take over the three franchises at issue. At the times at which he made these agreements there were no requirements concerning keeping the stations open 24 hours a day, seven days a week. Some time after taking over the various stations, Petitioner made the decision to remain open extended hours, advising Respondent of his decisions and agreeing with Respondent that any future decisions regarding further changes in hours were also Petitioner's to make (Appellant's Appeal to the Ninth Circuit, Excerpts of Record ("ER") 54; ER 76-78).

Throughout his seventeen years as a franchisee of Respondent, Petitioner exceeded by many times the agreed-upon goals for sale of motor fuel, a situation which continued even after his decision in October, 1992 to close his three service stations on his Sabbath. Petitioner, in accord with his previous practice,

notified Respondent in writing of this decision. In October, 1992, Respondent signed a new franchise agreement for the Clackamas station in line with this notification (ER 55). No hours were required by the sales agreement between Petitioner and Respondent in regard to the Salem station (ER 10), and the sales agreement for the Eugene station only requires 12 hours a day, from midnight to noon (ER 15; ER 54; ER 60).

In 1992, new management took over the territory of Oregon, and refused to recognize Petitioner's contractual right to establish his own hours and to honor his Sabbath. Management sought to force Petitioner to open 24 hours a day, seven days a week. On April 21, 1993, Respondent franchisor filed an action in the United States District Court for the District of Oregon against Petitioner franchisee, seeking a temporary restraining order compelling Petitioner to keep open franchised service stations 24 hours a day, seven days a week. Although Petitioner argued that such requirements had not been part of the franchise agreements for the stations in question from the commencement of his franchise, and that he was unable to comply with Respondent's demands due to his religious beliefs concerning the Sabbath, the temporary restraining order was granted on April 26, 1993, and a preliminary injunction was granted to Respondent on May 7, 1993.

On May 18, 1993, concurrently with giving Petitioner only 10 days notice of termination of his three franchises, contrary to the provisions of the Petroleum Marketing Practices Act (15 U.S.C. § 2801 *et seq.*, § 2804) ("PMPA"), Respondent filed a termination action in U.S. District Court. On May 25, 1993, Petitioner counterclaimed under the PMPA, moved for a temporary restraining order to prevent termination, and sought an order to show cause why a preliminary injunction should not be granted until a trial could be had on the merits.

The District Court denied Petitioner's application for a temporary restraining order on July 2, 1993, citing Petitioner's

failure to comply with a previous order to remain open 24 hours a day, seven days a week as grounds for refusing the protection of the court to Petitioner in this instance.

On October 20, 1993, the District Court granted a motion by Respondent for summary judgment against Petitioner. Petitioner properly appealed this decision to the United States Court of Appeals for the Ninth Circuit, which issued its decision affirming the judgment of the District Court on December 29, 1994.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari in order to resolve a conflict that has arisen between the economic rights of companies under federal legislation and the constitutionally protected fundamental rights of citizens to exercise their religious beliefs. The decision of the Court of Appeals for the Ninth Circuit in the instant case threatens the First Amendment rights of all citizens by subjugating constitutional rights to the economic rights of commercial enterprises, and by refusing to accord the proper weight to those constitutionally protected rights when balancing interests and hardships.

The District Court and Court of Appeals upheld the termination of Petitioner's franchises under the Petroleum Marketing Practices Act, in that Petitioner had failed to obey an order to remain open on his Sabbath and that, by so doing, he had violated his franchise agreements in such a fundamental manner that he had negated the requirement under the statute to be given 90 days notice of termination. The Court of Appeals further held that, because Petitioner was no longer in possession of the stations, all claims for damages were moot. Petitioner respectfully suggests that the courts erred in these decisions, in that Petitioner's Fourteenth Amendment right to have his case heard on the merits was violated at the lower court level, that an improper balancing of interests in respect of relative hardships

was applied at the lower court level and upheld at the Court of Appeals, and that the reasoning of the lower courts regarding mootness was circular.

This Court should also grant certiorari in order to resolve a conflict arising out of the refusal to afford Petitioner the protection of the court in an action filed subsequent to Petitioner's anguished decision that he could not sacrifice his religious beliefs by following a District Court order requiring him to open his franchised service stations on his Sabbath. Petitioner submits that such judicial orders, which potentially affect a party's entire life, should only be granted after a full review of all the evidence sought to be adduced.

This Court should also grant certiorari in order to avoid confusion in the law and to clarify the conditions for a finding of "state action" where a claim under 42 U.S.C. § 1983 is being made against a private party.

These reasons for granting certiorari are further expanded hereafter in this Petition.

I. WHERE A FRANCHISEE COMPLIES WITH EXISTING CLAUSES IN FRANCHISE AGREEMENTS, HIS FRANCHISE MAY NOT BE TERMINATED FOR REFUSAL TO COMPLY WITH DEMANDS BASED ON NEW POLICIES OF THE FRANCHISOR, WHEN TO SO COMPLY WOULD VIOLATE HIS CONSTITUTIONALLY PROTECTED RELIGIOUS BELIEFS.

This is a case which may fittingly be termed "David against Goliath." Petitioner had been an outstanding franchisee of Respondent for seventeen years, consistently selling greater quantities of motor fuel than his franchise agreements demanded, and was often used by Respondent to train new franchisees. Further, Petitioner was, on occasion, asked by Respondent to take over service stations that were ailing.

As stated above, no provisions regarding hours of opening initially were included in Petitioner's franchise agreements with Respondent. It was Petitioner's decision to change the hours, and his agreement with Respondent's managers was that it was open to him to make changes as and when he deemed it appropriate. Such flexible agreements are permitted under the PMPA (*See Hanes v. Mid-America Petroleum, Inc.*, 577 F.Supp. 637 (W.D. Mo. 1983), where the court held that a written or oral contract under 15 USC § 2801(10) superseded any Missouri law regarding the necessity for a contract to be in written form, and permitted oral testimony as to the conditions of the agreement.).

The flexible approach to opening hours followed by Respondent and Petitioner for seventeen years, until early 1993, is reflective of the general business practice of franchising companies in allowing franchisees discretion in decision-making within their territory, subject to compliance with income generating clauses and safety and health provisions. Indeed, out of over 4,000 Texaco-branded stations, directly supplied or jobber supplied, the hours of more than 3,000 of them are not regulated.

Since it was Petitioner's religious objections to working on his Sabbath that instigated the termination, and not a provision contained in the sales agreements between Petitioner and Respondent, Petitioner submits that his fundamental constitutional right to freely exercise his religion was violated by the termination of his franchise agreements by Respondent.

(1) Whether a term of a franchise agreement is fundamental to the franchise relationship and is reasonable is a question of fact, not to be decided on summary judgment.

The dispute in the instant case is one between franchisor and franchisee, and is one that is separate and distinct from the conflict between Petitioner and the United States District Court as to the validity of and compliance with a judicial order requiring Petitioner to remain open on his Sabbath. Therefore,

the proper course for the Court of Appeals to follow would have been to assess the validity of the parties' claims to breach of the franchise agreement.

The reasonableness of a franchise term is to be decided by the trier of fact (*Serianni v. Gulf Oil Co.*, 662 F.Supp. 1020 (E.D. Pa. 1986)).

In the instant case, Respondent initially claimed breach of an hours requirement of the franchise agreements, and asserted the reasonableness and material significance of that requirement. However, on summary motion in the District Court, due to the actual terms of the agreements, Respondent was forced to argue instead that, *regardless of whether or not the agreement actually provided for 24 hour, seven day a week opening hours*, the conflict between the court and Petitioner regarding the injunction granted by the District Court in May, 1993 was so fundamental to the franchise relationship that summary judgment for Respondent was appropriate.

As stated above, Petitioner's agreements with Respondent did *not* contain provisions requiring station operation 24 hours a day, seven days a week. If there were no hours requirement in the franchise agreements, the initial injunction was improperly issued, and thus reliance by Respondent on that injunction was also improper. The issue was, in any event, one of fact to be determined in a hearing on the merits, not on summary judgment. As the Court of Appeals stated in *Doebereiner v. Sohio Oil Co., 880 F.2d 329, amended, 893 F.2d 1275 (11th Cir. 1990)*:

> [W]e conclude that Congress intended to permit termination or nonrenewal *only* when the franchisee's failure to comply involves a franchise provision that is both reasonable — that is, fair, proper, just or moderate — *and* of real importance or great consequence to the franchise relationship. This analysis necessarily involves *an examination of the facts and*

> *circumstances surrounding the franchisor's inclusion of the provision in the franchise agreement* as well as the franchisee's breach of the provision.

Id. at 1276 (emphasis added).

Respondent also attempted to assert that termination of the franchise agreement was proper in that any violation of a judicial order was of such a materially significant nature to the franchise relationship that Respondent had no choice but to terminate the franchise (and to do so with less than 90 days notice). However, the provision Respondent relied upon for this proposition related only to violations of judicial orders "pertaining to the Agreement and the loading, storage, transportation and sale of petroleum products," (Section 22(i) of the Sales Agreements) or, in other words, those orders relating to the fundamental purpose of the franchise. Whether or not Petitioner's failure to comply with the judicial order at issue was materially significant to the franchise relationship is a question of fact to be decided at a hearing on the merits, not on summary judgment. Therefore, the finding of the District Court that "termination of the contracts by Texaco is based *solely* upon Davis' failure to comply with the orders of this court," (Appendices D-12 and E-8) provides an insupportable basis for termination of the franchise agreements.

(2) Respondent did not meet its statutory obligations to provide proper notice of termination under the Petroleum Marketing Practices Act, and any claim for damages is therefore not moot.

Congress passed the PMPA in order to protect the Davids from the Goliaths, subsequent to numerous complaints from franchisees of terminations or nonrenewals of franchises for arbitrary or even discriminatory reasons (*See Nassau Boulevard Shell Service Station, Inc. v. Shell Oil Co.*, 875 F.2d 359 (2nd Cir. 1989); *Saad v. Shell Oil Co.*, 460 F.Supp. 114 (E.D. Mich. 1978)). 15 USC § 2804(a)(2) provides for a 90 day notification

to franchisee of termination. This is not an optional provision; the 90 days notice is a "mandatory prerequisite." (*Blankenship v. Atlantic-Richfield Co.*, 478 F.Supp. 1016 (D. Ore. 1979).

In the instant case, Respondent provided Petitioner with only 10 days notice, and Petitioner respectfully suggests that there were no conditions existing sufficient to bring Respondent within an exception to the notification requirement, under 15 U.S.C. § 2804(b)(1). This subsection provides only two instances in which notification of less than 90 days is permissible: (1) if the circumstances are such that it is reasonable, and (2) if notice is given on the earliest "reasonable practicable" date. Courts have rightly severely limited those circumstances in which this exception can be claimed by franchisors (*See Romero Rodriguez v. Esso Standard Oil Co.*, 636 F.Supp. 615 (D. P.R. 1986), where the exact effective date of termination was dependent upon a decision by the government to claim the property under an eminent domain action; *Smoot v. Mobil Oil Corp.*, 722 F.Supp. 849 (D. Mass. 1989), where the court held that the persistent failure of the franchisee to have gas for sale at his franchised stations constituted a serious default of his franchise agreement, since the fundamental purpose of such an agreement was to sell Mobil products; *Marathon Petroleum Co. v. Pendleton*, 889 F.2d 1509 (6th Cir. 1989), where the franchisee's declining interest in the operation of the station, his failure to maintain sufficient gas supplies, and his history of untimely payments to the franchisor were held sufficient to justify less than 90 days notice of termination.)

In *Wisser Co. v. Mobil Oil Corp.*, 730 F.2d 54 (2nd Cir. 1984), the franchisee had been selling misbranded gas under the franchisor's trademark. The court held that the franchisor was justified in giving franchisee less than 90 days notice, but noted that one of the considerations in allowing Mobil to disassociate itself from franchisee in a shortened period of time was that the

franchisee was the owner of the premises and therefore was not faced with immediate eviction and the associated financial ruin.

Courts have been strict in applying reasonableness standards to notification requirements. In *Hanes v. Mid-America Petroleum, Inc.*, 577 F.Supp. 637 (W.D. Mo. 1983), the court held that a franchisor's termination of the franchise by removing its sign from the premises and refusing to supply any more gas to franchisee was unreasonable. There had been an ongoing dispute between franchisor and franchisee surrounding customer complaints and insufficient fund checks delivered to franchisor. However, the court stated:

> Congress did recognize that these events are proper grounds for termination, 15 U.S.C. § 2802, but the existence of those events does not excuse the franchisor from adhering to the 90-day requirement. Allowing the franchisor to avoid the requirement merely because proper grounds are alleged would eliminate the 90-days requirement altogether.

Id. at 1302. As the Court of Appeals noted in *Avramidis v. Arco Petroleum Products Co.*, 798 F.2d 12 (1st Cir. 1986):

> The purpose of the PMPA's notice requirements is to give the dealer sufficient advance warning of the impending termination so that he may make appropriate arrangements.

Id. at 17.

In requiring stringent adherence to the notification requirements of the PMPA, the courts have recognized the fundamentally punitive nature of termination of a franchise. Such an extreme remedy must be sparingly utilized, and then only for misconduct that goes to the heart of the franchisee's ability to perform his obligation under the franchise agreement. As the court stated in *Union Oil Co. v. O'Riley*, 226 Cal. App. 3rd 199, 276 Cal. Rptr. 483 (1990), whether or not a shortened notifica-

tion period was reasonable was a question of fact. Thus, in *Naff v. Standard Oil Co.*, 527 F.Supp. 160 (S.D. Ohio 1981), summary judgment for the franchisor was held *not appropriate* where there was a material dispute as to the true reasons and motives for termination of the franchise in a situation where franchisee was allegedly mishandling receipts.

If a franchisor violates the provisions of the PMPA and deprives a franchisee of his living, damages must attach, else powerful companies would have no incentive to act in accordance with the spirit and the letter of the law. As this Court has held, where claims for damages remain viable, the mooting of claims for injunctive relief does not moot the entire case (*Flagg Bros. v. Brooks*, 436 U.S. 149, 154 n.3, 98 S.Ct. 1729, 1732 n.3., 56 L.Ed.2d 185 (1978)). The Ninth Circuit Court of Appeals has itself held that an appeal from a preliminary injunction was not mooted by the fact that the underlying issue had been settled, since resolution of the issues presented on appeal would be crucial to deciding the damages claim (*Trans International Airways, Inc. v. International Brotherhood of Teamsters,* 650 F.2d 949 (9th Cir. 1980)).

If reinstatement in his position as franchisee is deemed impossible, Petitioner is entitled to monetary damages. Petitioner's claims are not moot.

II. WHERE A JUDICIAL ORDER REQUIRES A FRANCHISEE TO VIOLATE HIS RELIGIOUS BELIEFS, IT MAY NOT VALIDLY BE ISSUED WITHOUT REVIEWING ALL THE EVIDENCE OFFERED BY BOTH PARTIES.

(1) The District Court abused its discretion when it granted injunctive relief to Respondent.

The United States District Court which, in April, 1993, heard the request by Respondent for a temporary restraining order forcing Petitioner to open his stations on Saturdays, re-

fused to allow Petitioner to produce witnesses or cross-examine Respondent's witnesses. Judge Frye made the decision to grant the TRO solely on the basis of affidavits, and over the strenuous objections of Petitioner that the facts were not as presented and that he could not disobey his God. In the subsequent action for termination, Petitioner's non-compliance with the earlier order was central to the denial of relief to Petitioner. Petitioner respectfully submits that the District Court erred in (1) granting the TRO and the preliminary injunction, and (2) in making Petitioner's non-compliance with the injunction one of the determinative factors in granting summary judgment to Respondent. Petitioner further suggests that the Court of Appeals erred in affirming the reasoning of the District Court in these respects.

The rules governing the granting of injunctive relief generally have established that "[t]he general purpose of a preliminary injunction is to preserve the status quo until the merits of the action can be determined." (*Harbor Chevrolet v. Machinists Local Union 1484*, 173 Cal.App.2d 380, 384, 343 P.2d 640, 642 (1959).) This the District Court manifestly failed to do.

Injunctive relief under the PMPA was designed to be claimed by franchisees, in order to prevent unconscionable acts by large, powerful franchising companies. Under this legislation, the franchisee is not required to establish a "probability" of success on the merits of the case, but only a reasonable chance of success (*Nassau Boulevard Shell Service Station, Inc. v. Shell Oil Co.*, 875 F.2d 359 (2nd Cir. 1989); *Moody v. Amoco Oil Co.*, 734 F.2d 1200 (7th Cir. 1984), *cert. denied*, 469 U.S. 982, 105 S.Ct. 386, 83 L.Ed.2d 213). The franchisee has only the burden of demonstrating the existence of "sufficiently serious questions" as to the propriety of termination or renewing a franchise, for example, to present a "fair ground" for litigation (*Khorenian v. Union Oil Co.*, 761 F.2d 533 (9th Cir. 1985)). Given the disputed facts and the assertion of Petitioner's constitutional rights in the instant case, Petitioner submits that the case should

have proceeded to a hearing on the merits and that injunctive relief should not have been afforded Respondent.

Further, under the PMPA, the franchisee is not required to make a showing of "irreparable harm" in injunctive relief proceedings, but need merely show that the "balance of hardships" tips in his favor. This is a lesser standard than that required to be established by the franchisor. Even so, in *Sternberg v. Checker Oil*, 573 F.2d 921 (6th Cir. 1978), the court held that loss of a franchise would satisfy the irreparable harm standard. Since the effect of forcing Petitioner to choose between his religion and his livelihood was likely to be, and in fact was, the deprivation of Petitioner's livelihood, Petitioner has more than met his burden of tipping the balance of hardship in his favor.

Respondent's claimed "harm" in the instant case was economic and, at most, would have amounted to a sum of money still greater than that anticipated and agreed upon in Petitioner's sales agreements with Respondent, even if not as great as might have been obtained had Petitioner remained open 24 hours a day. Greed is not a sufficient reason for the suppression of constitutionally protected rights. Indeed, greed was the reason for the implementation of many of our labor laws, including child labor laws and hours relating to pay and time off for hours worked. Petitioner was exceeding agreed-upon expectations of income for Respondent. He might have made more money for himself and for Respondent had he stayed open 24 hours a day, seven days a week, but the law does not require that he make the most money in the nation in order to retain his franchise — it requires that he comply with the income generating clauses of his agreements, and that he did.

The law certainly does not require that Petitioner sacrifice his religious beliefs for the economic betterment of Respondent. Further, since Petitioner placed directions to the nearest open Texaco station each Saturday, other Texaco franchisees will have benefited both themselves and Respondent by taking some

of the customers that might otherwise have filled up their cars at Petitioner's stations.

Notwithstanding the above, in its May 7, 1993 granting of an injunction against Petitioner, the United States District Court stated that the balance of harm test required for the issuance of an injunction established that Respondent demonstrated irreparable harm to Respondent, and no equivalent harm to Petitioner. The Court refused to consider as harm the deprivation of Petitioner's First Amendment rights should he be forced to sacrifice his religious beliefs in order to comply with the demand of Respondent that he remain open 24 hours a day. The Court also relied heavily on what it termed his obligation to "perform his agreements" with Respondent (Appendix A-10). As we have demonstrated above, the issue of whether one of the obligations of Petitioner's agreements was to remain open 24 hours a day, seven days a week was one of the central issues in the case, and was a matter for the fact finder to decide at a hearing on the merits. Had the District Court ruled in accord with precedent, Petitioner would have been afforded the opportunity to place his evidence before the trier of fact and to cross-examine the witnesses for Respondent.

(2) The substantial cooperation between the State and Respondent requires Respondent to protect Petitioner's constitutional rights under the First and Fourteenth Amendments.

The United States District Court refused to acknowledge that Petitioner's right to free exercise of his religion under the First Amendment, and his right to have his constitutional arguments heard under the Fourteenth Amendment, could be considered as a sufficient counter-balance to Respondent's economic rights. Petitioner .espectfully suggest that this was error. Fundamental constitutional protections must always be balanced against statutory and economic interests when consid-

ering the appropriate remedy in a legal dispute and, at the very least, such claims must be heard before a decision is rendered.

This Court has never definitively determined how the color of state law requirements for a claim under 42 U.S.C. § 1983 is satisfied in the case of a private party. Petitioner respectfully submits that the substantial cooperation between the State and Respondent in providing services to the public amounts to state action, and prohibits Respondent from discriminating on the grounds of religion. Petitioner further submits that the relationship between Respondent, a major multinational oil company, and the state government of Oregon, which exercises substantial quality controls over Respondent's products and facilitates its business on state highways by granting Respondent at least partial monopoly status and allowing it to place notices on the highways of its premises, is sufficient to establish that Respondent's actions are "under color of state law."

In *NCAA v. Tarkanian*, 109 S.Ct. 454 (1988), this Court stated that "in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor," (*Id.* at 462.) and stressed the importance of the public and private entities sharing common objectives. Respondent's claim that termination of two of the three franchised stations was justified because of the proximity of these stations to the highway system demonstrated a common purpose with the State to facilitate the easy flow of traffic on that system and a desire to enhance the view of the State held by income-generating visitors to the State.

In *Howerton v. Gabica*, 708 F.2d 380 (9th Cir. 1983), the 9th Circuit Court of Appeals held that a private tenant's § 1983 action against his landlord was sustainable where the landlord had employed the assistance of a police officer in evicting the tenant, thereby "creat[ing] an appearance that the police sanctioned the eviction" and "put their weight behind [t]he private decision to evict," (*Id.* at 384, 384 n.9). Petitioner respectfully

requests that this Court take note that the regulation of oil company products by the State and the cooperation between State and oil companies in the establishment and maintenance of efficient highway systems is common knowledge in the nation. Thus, Respondent's conduct in terminating Petitioner's franchises (which initiated a flood of comments from the public, the vast majority in favor of Petitioner's right to observe his Sabbath and the possible implications for future utilization of Respondent's products by the letter writers should Petitioner's franchises be terminated), created an appearance of State encouragement and support for discriminatory conduct. (See also *Greco v. Guss*, 775 F.2d 161 (7th Cir. 1985); *Harris v. City of Roseburg*, 664 F.2d 1121 (9th Cir. 1981).)

As this Court stated in *Edmonson v. Leesville Concrete Co.*, 111 S.Ct. 2077 (1991):

> Although the conduct of private parties lies beyond the Constitution's scope in most instances, governmental authority may dominate an activity to such an extent that its participants must be deemed to act with the authority of the government and, as a result, be subject to constitutional constraints. This is the jurisprudence of state action, which explores the "essential dichotomy" between the private sphere and the public sphere, with all its attendant constitutional obligations.

Id. at 2082 (citations omitted).

Petitioner respectfully submits that Respondents should not be permitted to hide behind a flimsy veil of "private" action in order to escape its obligations to uphold the civil rights of its franchisees.

CONCLUSION

Petitioner respectfully submits that the United States District Court acted improperly in denying him a hearing on the merits of his case in the termination action instituted by Respondent, based on disputed issues of fact. Petitioner further submits that Respondent did not comply with the mandatory provisions of the Petroleum Marketing Practices Act in failing to give Petitioner 90 days notice of termination of his franchise, and that Petitioner has suffered irreparable harm as a result of Respondent's misconduct.

Petitioner further submits that his fundamental constitutional right to freely exercise his religion was violated by the termination of his franchise agreements by Respondent, since it was his religious objections to working on his Sabbath that instigated the termination, and not a provision contained in the sales agreements between Petitioner and Respondent.

Accordingly, we respectfully request that this Court reverse the decision of the lower courts with respect to the termination of Petitioner's franchises and his claim for damages arising therefrom.

Respectfully submitted,

Alexis I. Crow
Counsel of Record
Anne-Marie Amiel
THE RUTHERFORD INSTITUTE
1445 E. Rio Road
Charlottesville, VA 22901
(804) 978-3888

Davis S. Shannon
Thomas P. Walsh
SHANNON, JOHNSON & BAILEY, P.C.
575 Lloyd Center Tower
825 N.E. Multnomah Street
Portland, OR 97232-2154
(503) 232-3171

March 29, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

TEXACO REFINING AND MARKETING, INC.,
a Delaware Corporation,

Plaintiff,

v.

HARRY P. DAVIS

Defendant.

No. 93-481-FR

Robert E. Maloney, Jr., OSB #67085
James L. Robart, WSB # 5333
LANE POWELL SPEARS LUBERSKY
520 SW Yamhill Street, Suite 800
Portland, Oregon 97204-1383
(503) 226-6151

Attorneys for Plaintiff

PRELIMINARY INJUNCTION

This matter came before the Court on May 3, 1993, pursuant to plaintiff's motion and the Court's order requiring defendant to show cause why a preliminary injunction should not issue. In the underlying action, plaintiff seeks a declaratory judgment and injunctive relief requiring that defendant comply with his contractual agreements concerning hours of operation at three Texaco brand service stations.

Plaintiff filed and served its complaint and its motion for a temporary restraining order on April 21, 1993. Defendant appeared through counsel on April 22, 1993, filing papers in opposition. On April 26, 1993, following a hearing attended by defendant and his counsel, the Court entered a temporary restraining order and an order to show cause, setting a hearing for

May 3, 1993 on plaintiff's application for a preliminary injunction. On April 28, 1993, defendant filed a motion to postpone the preliminary injunction hearing, which the Court granted on the condition that defendant comply with the Court's temporary restraining order.

Because defendant closed his three Texaco brand stations on April 30 and May 1, 1993, in violation of the restraining order, the preliminary injunction hearing went forward, as originally scheduled, on May 3, 1993. After considering the briefs and arguments of counsel, the Court grants a preliminary injunction and makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff Texaco Refining and Marketing Inc. ("TRMI") is a Delaware corporation with its principle place of business in California. It is authorized to do business in Oregon.

2. Defendant Barry P. Davis ("Davis") is a citizen and resident of Oregon. Davis operates three Texaco brand retail motor fuel stations in the state of Oregon.

3. This court has jurisdiction pursuant to 28 U.S.C. §1332 because plaintiff and defendant are citizens of different states, and the amount in controversy exceeds the sum of $50,000 exclusive of interest and costs. Although plaintiff seeks injunctive relief, and the full extend of its damages cannot be precisely calculated, the dollar values of its losses and potential losses are in excess of all jurisdictional limits. Pursuant to 28 U.S.C. § 1391, venue is proper in this Court, as defendant is a citizen and resident of Oregon and the controversy arises in this state.

4. Defendant leases each Texaco brand station from TRMI pursuant to a separate lease. Defendant also has a separate sales agreement for each station. Each is a high volume station.

5. The three stations are located as follows:

a. One at 3502 Portland Road, NE, Salem, Oregon (the "Salem station"). The agreements for this station expire, according to their terms, on July 31, 1994. The Salem station is approximately one mile from the Interstate-5 (I-5) interchange, on a main roadway between I-5 and downtown Salem. This is defendant's highest volume station. It sold approximately 4.6 million gallons of Texaco brand motor fuel in 1992.

b. One at 3640 Glenwood, Eugene, Oregon (the "Eugene station"). The agreements for this station expire, according to their terms, on August 31, 1993. The Eugene station is located at an interchange of I-5. This station sold approximately 2.5 million gallons of Texaco brand motor fuel in 1992.

c. One at 16002 SE 82nd Drive, Clackamas, Oregon, (the "Clackamas station"). The agreements for this station expire, according to their terms, on March 31, 1996. The Clackamas station is located at an interchange of Interstate-205. This station sold approximately 3.7 million gallons of Texaco brand motor fuel in 1992.

6. Davis has operated the Salem station since 1976. Since at least 1988, pursuant to his sales agreements with TRMI (as renewed and amended from time to time), and the course of dealing between the parties, Davis operated that station 24 hours a day, every day of the year, except Christmas and New Year's Day (until January 1, 1993). Davis has operated the Eugene station since approximately 1983. Since at least 1988, pursuant to his sales agreements with TRMI (as renewed and amended from time to time), and the course of dealing between the parties, Davis operated that station 24 hours a day, every day of the year, except Christmas and New Year's Day (until January 1, 1993).

7. Davis has operated the Clackamas station since 1990. Since 1990, pursuant to his sales agreements with TRMI (as

renewed and amended and from time to time), and the course of dealing between the parties, Davis operated that station 24 hours a day, everyday of the year, except Christmas and New Year's Day (until January 1, 1993).

8. In the fall of 1992, Davis told TRMI that certain religious events had occurred in his personal life which caused him to believe God wanted him to close his stations from sundown Friday to sundown Saturday (hereafter, Friday evening through Saturday evening).

9. It was the intent of the parties that Davis operate each of the stations 24 hours a day every day of the year. In an October 12, 1992, letter TRMI defendant made the request that the parties' agreements "be amended to reflect a change from 24 hours, 365 days a year to 24 hours a day, except for the Lord's Sabbath, (from sundown Friday to sundown on Saturday) commencing on January 1, 1993."

10. The parties' current agreements, considered in light of their course of dealing and performance, require that defendant provide service to the public during at least the following hours of operation at each of his Texaco stations:

a. 24-hour operation each day at defendant's stations at 3502 Portland Road, NE, Salem, Oregon and 3640 Glenwood, Eugene, Oregon, and

b. 24-hours operation of defendant's station at 16002 SE 82nd Drive, Clackamas, Oregon each day except Saturday.

Defendant was also required to remain open during these hours pursuant to the Court's April 26, 1993 temporary restraining order.

11. Following defendant's October 12, 1992 request, in face-to-face meetings and in correspondence, TRMI repeatedly advised defendant that it would not agree to his proposed changes to the parties' agreements. TRMI suggested several alternatives, such as reducing the hours at the Salem station;

having defendant's employees operate the stations from Friday evenings through Saturday evening without involving defendant; or making a donation of his Friday evening through Saturday evening income to a religious charity of defendant's choice.

12. Defendant rejected these suggestions, and, on January 1, 1993, began closing his stations from sundown Friday until sundown Saturday in deliberate violation of his contractual obligations to TRMI. In face-to-face meetings, and in letters, TRMI repeatedly objected to defendant's closures and attempted to persuade him to accept some alternative which would keep the stations open as agreed.

13. Although TRMI's total area sales declined slightly in 1993, defendant's Friday-Saturday closures have resulted in a significant loss of business at his stations. During the first quarter of 1993, TRMI's retail sales in Oregon and Southwest Washington were down approximately 4.2 percent, when compared to the first quarter of 1992. However, the sales of defendant's three locations for the first quarter of 1993, as compared to the same period for 1992, were down 27.5 percent at Eugene; 31.7 percent at Clackamas, and 46.6 percent at Salem for a combined total loss of 1,146,672 gallons or 37.6 percent.

14. Davis' closures since January 1, 1993, are detrimental to TRMI and the thousands of Texaco customers who have been unable to purchase gasoline or other services from defendant at those times. Because of the stations' locations, a substantial number of motorists leave the highway to seek service, even when the stations are closed. During period between sundown Friday night, April 9, 1993 and sundown Saturday night, April 10, 1993 the following observations were recorded:

a. Clackamas station - over 350 vehicles entered the premises apparently for the purchase of gasoline.

b. Salem station - over 450 vehicles entered the premises apparently for the purchase of gasoline.

c. Eugene station - over 240 vehicles entered the premises apparently for the purchase of gasoline.

The potential customers identified during these periods of observation included a substantial number of cars with out-of-state license plates.

15. As a result of defendant's deliberate violation of this Court's temporary restraining order entered on April 26, 1993, there is evidence of substantial additional loss of business. Defendant was present in the courtroom when the temporary restraining order was entered and bonded, and subsequently later publicly announced his intention to violate the order. During periods between sundown Friday, April 30, 1993 and sundown Saturday, May 1, 1993, at defendant's Salem and Eugene Texaco stations, and from Sundown to midnight on Friday, April 30, 1993 at defendant's Clackamas station, the following observations were recorded:

a. Defendant's Clackamas station was closed to the public for business beginning at approximately 8:20 p.m. Friday night, April 30, 1993 and remained closed through midnight that same night. Even though the station was closed to the public at 8:20 p.m., a service station employee returned to the station at about 9:42 p.m. Friday night, April 30, 1993 and engaged in activities at the station (including work to increase posted prices) until approximately 10:33 p.m. Friday night, at which time he left. While he was there, several vehicles drove into the station apparently intending to purchase gasoline or obtain other service. They were not given any service and left.

b. The Salem station was closed to the public beginning at 8:30 p.m. Friday night, April 30, 1993 and remained closed until approximately 8:21 p.m. Saturday, May 1, 1993. Even though the station was closed to the public at 8:30 p.m.

Friday night, the attendant remained inside engaged in some activities until approximately 9:23 p.m. at which time the attendant left the station. Over 550 vehicles entered the station, while it was closed on April 30 and May 1, 1993.

c. The Eugene station was closed to the public beginning at 8:00 p.m. Friday night, April 30, 1993. The station remained closed through approximately 8:05 p.m. Saturday, May 1, 1993. Even though the station closed at 8:00 p.m. Friday an attendant remained there until approximately 10:37 p.m. Friday night engaged in some activities. At least 393 vehicles entered the Texaco service station while it was closed between April 30 and May 1, 1993. Of these vehicles, 288 then proceeded to an Exxon station located nearby.

The total cars coming into the Clackamas, Eugene and Salem stations during the periods of observation beginning Friday, April 30, 1993 through Saturday, May 1, 1993 was approximately 1,000 bearing both Oregon and out-of-state license plates.

16. Customers expect major brand stations located on or near freeways to be open during normal driving time, which includes time periods from early in the morning until late at night, seven days a week. Customers also expect a reasonable number of stations to be open at all times. A customer who goes to the trouble to leave a freeway or otherwise make an effort to stop at a service station during hours when the customer expects the station to be open will not have his or her expectations met and will therefore experience dissatisfaction.

17. TRMI and its entire dealer network are harmed when individual stations do not meet customer expectations. Consumers expect Texaco brand stations to be open during normal business hours, and when a Texaco brand station does not meet that expectation, the probability that they will patronize other Texaco brand stations in the future is reduced. Plaintiff has a substantial investment, through advertising and other efforts, in

promoting and preserving its reputation and goodwill with such customers. TRMI suffers additional irreparable harm with each closure of defendant's stations.

18. Expert testimony based on observation of these three stations and data gathered from identification of license plates confirms that defendant's station attract a substantial volume of non-local customers. It is significant that over 3 months after defendant began closing his Texaco brand stations, hundreds of potential customers are coming to these stations between sundown Friday and sundown Saturday.

19. In the present case, this Court is faced with the enforcement of a private contract which is not directed to religious belief or conduct. The provision at issue reflect reasonable commercial concerns which are material to TRMI's agreement to leave its property to defendant and sell Texaco brand motor fuel under the parties' sales agreements. TRMI has taken no action for the purpose of restricting defendant's religious beliefs and the enforcement of these private agreements does not involve state action by any agency of federal, state or local government or any other governmental entity.

20. TRMI has a substantial interest in protecting and enhancing the "Texaco" tradename and brand by offering quality service and products to the motoring public and in maintaining its marketing position through high volume, competitive retail service stations. To maintain its market share and remain competitive with other major and private brand gasoline outlets, TRMI's interest in insuring that its Texaco brand service stations remain open to motor fuel customers is strong. This is particularly true where the stations are located near competitor facilities.

21. TRMI has and will continue to suffer substantial financial and competitive harm and irreparable injury to the "Texaco" tradename and brand, including injury to the reputation and goodwill which Texaco has developed with the motor-

ing public, unless defendant is enjoined from breaching his agreements with TRMI. In contrast, a preliminary injunction requiring defendant to comply with the agreement will not financially harm defendant and will only require that he perform (or have others perform) agreements entered into voluntarily at the time TRMI leased the Texaco brand stations to defendant.

22. A significant public interest is affected adversely by defendant's breach of his agreements with TRMI. The injury to the motoring public includes delay and confusion over not being able to obtain service at defendant's Texaco brand stations during customary hours, as well as inconvenience and frustration at having to obtain gasoline at competing stations after first stopping at defendant's stations with the reasonable belief that they would be open on Friday evenings and Saturday. Defendant's closure of stations in heavily travelled areas, and at the start of weekend travel, is a substantial burden on the motoring public.

CONCLUSIONS OF LAW

1. Based on the citizenship of the parties, the amounts in controversy, and the origin of the dispute, jurisdiction and venue are established in this Court.

2. TRMI is suffering and will continue to suffer irreparable injury to the "Texaco" tradename and brand, and to reputation and goodwill with the motoring public if defendant is not enjoined from breaching the agreements which govern the operation of his service stations. Additionally, continued closures by defendant under the circumstances presented in this case will present a dangerous probability that TRMI will suffer irreparable injury to its competitive position in the markets in which the stations are located.

4. Plaintiff will likely succeed on the merits of its claim: the fact of defendant's deliberate breach of contract is established by the evidence. Plaintiff has no adequate remedy at law

and is entitled to specific performance of its agreement. The full extent of TRMI's economic loss cannot be adequately determined, and plaintiff is also suffering substantial intangible loss to its reputation, credibility and goodwill.

5. The balance of harm to the parties weighs heavily in favor of a preliminary injunction. TRMI faces continuing irreparable injury to the "Texaco" tradename and brands and will incur irreparable damage to its reputation and market position if relief is not granted, while defendant will not suffer financial or economic harm and will only be required to perform (or have others perform) his agreements with TRMI.

6. The public interest in convenient access to defendant's stations, and enforcement of private commercial agreements, also will be served by preliminary injunctive relief.

7. Plaintiff has satisfied the traditional requirements for a preliminary injunction as it has demonstrated irreparable harm, probable success on the merits, a balance of hardships favoring injunctive relief, and that significant public interest will be served if such relief is granted.

8. Plaintiff also satisfies either test under the two-part alternative standard for injunctive relief: plaintiff has shown probable success on the merits and irreparable injury; plaintiff has also shown that serious questions are raised and that the balance of hardships favors its request for a preliminary injunction.

9. The provisions of Oregon's Uniform Commercial Code apply to the interpretation of the parties' sales agreements and their course of dealing and course of performance.

10. The protections afforded plaintiff's exercise of his religious beliefs under the United States Constitution and the Oregon Constitution do not permit him to avoid the enforcement of his private contractual obligations. These obligations reflect reasonable commercial concerns of general application, which

are material to the parties' agreements, and the enforcement of these agreements does not involved state action.

11. Plaintiff is entitled to a preliminary injunction.

IT IS HEREBY ORDERED that a preliminary injunction is entered and defendant Barry P. Davis is enjoined as follows:

(1) Defendant is enjoined from breaching the parties' sales agreement requiring 24-hour operation each day of defendant's Texaco brand motor fuel stations at 3502 Portland Road, NE, Salem, Oregon and 3640 Glenwood, Eugene, Oregon, and therefore defendant shall cause said stations to be open and operating 24 hours per day seven days per week, and

(2) Defendant is enjoined from breaching the parties' sales agreement requiring 24-hour operation of defendant's Texaco brand motor fuel stations at 16002 SE 82nd Drive, Clackamas, Oregon each day except Saturday, and therefore defendant shall cause said station to be open and operating 24 hours each day except Saturday.

This order shall remain in effect through the trial of this case, unless otherwise ordered by this Court. The plaintiff shall continue to maintain a bond in the amount of $3,000.

DATED this 7 day of May, 1993.

/s/
UNITED STATES DISTRICT JUDGE

Presented by:
LANE POWELL SPEARS LUBERSKY

By: /s/
Robert E. Maloney, Jr, OSB # 67085
James L. Robart, WSB # 5333
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

TEXACO REFINING AND MARKETING INC.,
a Delaware Corporation,

Plaintiff,

v.

BARRY P. DAVIS,

Defendant.

Civil No. 93-481-FR
Filed 93 May - 7:00 p.m. 3:29

Clerk, U.S. District Court
District of Oregon
Portland, Oregon

OPINION AND ORDER

Robert E. Maloney, Jr.
James L. Robart
Lane Powell Spears Lubersky
520 S.W. Yamhill Street, Suite 800
Portland, Oregon 97204-1383

Attorneys for Plaintiff

David S. Shanon
Thomas P. Walsh
Shannon, Johnson & Bailey, P.C.
575 Lloyd Center Tower
825 N.E. Multnomah Street
Portland, Oregon 97232-2154

Attorneys for Defendant

FRYE, Judge:

Plaintiff, Texaco Refining and Marketing, Inc. (Texaco), bring this action for declaratory relief and specific performance against defendant, Barry P. Davis. The matter before the court is the motion of Davis for stay of preliminary injunction during pendency of appeal (#44).

BACKGROUND

Davis leases three Texaco-brand stations from Texaco in the State of Oregon. The stations are located in the City of Clackamas, at an interchange near Interstate 205; in the City of Salem, on Portland Road near Interstate 5; and in the City of Eugene, at an interchange near Interstate 5. The sales agreement between Davis and Texaco for the Salem and Eugene stations require Davis to keep those stations open 24 hours each day, seven days each week. The sales agreement between Davis and Texaco for the Clackamas station requires Davis to keep that station open 24 hours each day, every day except Saturday.

For a number of years, Davis operated the stations according to the time requirements in the leases. However, in October of 1992, Davis requested from Texaco that he be allowed to close his stations from sundown on Friday to sundown on Saturday in order to observe his Sabbath. Texaco refused but offered Davis several compromise solutions; however, the parties were unable to reach an agreement. Since January 1, 1993, Davis has closed his stations from sundown on Friday until sundown on Saturday.

On April 26, 1993, the court entered an order granting the motion of Texaco for a temporary restraining order to enjoin Davis from breaching the sales agreements at each of his service stations. On May 3, 1993, the court granted the motion of Texaco for a preliminary injunction, enjoining Davis from violating the requirements for hours of operations at the Salem, Eugene, and Clackamas stations. Davis now seeks a stay of the

preliminary injunction while he appeals the order to the United States Court of Appeals for the Ninth Circuit.

APPLICABLE LAW

Fed. R. Civ. P. 62(c) authorizes the court to suspend, modify, restore or grant an injunction during the pendency of an appeal. In addressing the motion for a stay pending appeal, the court examines the following factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill,* 481 U.S. 770, 776 (1987).

RULING OF THE COURT

The court has already found 1) that Texaco, and not Davis, has made a strong showing of likelihood of success on the merits, and 2) that Texaco will suffer irreparable harm to its goodwill if Davis continues to close his stations from sundown Friday to sundown Saturday. Davis has shown that he will be harmed if the injunction is not stayed in that he will not be allowed to follow the will of God as he sees it. Davis has not demonstrated that this harm is irreparable however. Finally, the public interest favors the enforcement of contracts which are freely and voluntarily entered into between the parties.

CONCLUSION

The motion of Davis for a stay of preliminary injunction during pendency of appeal (#44) is DENIED.

IT IS SO ORDERED.

DATED this 7 day of May, 1993.

/s/

HELEN J. FRYE
United States District Judge

C - 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

TEXACO REFINING AND MARKETING INC.,
a Delaware Corporation,

Plaintiff,

v.

BARRY P. DAVIS,

Defendant.

Civil No. 93-595-FR
Filed July 2, 1993

ORDER DENYING DEFENDANT'S MOTION FOR TRO

Robert E. Maloney, Jr., OSB No. 67085
James L. Robart, WSB No.5333
LANE POWELL SPEARS LUBERSKY
520 SW Yamhill Street, Suite 800
Portland, Oregon 97204-1383
(503) 226-6151

Attorneys for Plaintiff

THIS MATTER came before the Court on Thursday, May 27, 1993, on defendant's motion for an order temporarily restraining plaintiff from terminating defendant's franchises, and the Court has considered the motion, the parties' respective memoranda, the arguments of counsel and the pleadings and files herein as well as those in *Texaco Refining and Marketing Inc. v. Davis,* Civil No. 93-481-FR.

The Court finds that defendant deliberately disobeyed the temporary restraining order and preliminary injunction entered in *Texaco Refining and Marketing Inc., v. Davis,* Civil No. 93-481-FR, and that defendant has failed to establish a reason-

able chance of success on the merits of his claim that plaintiff improperly terminated his franchises. For these reasons the Court concludes that defendant's motion for a temporary restraining order should be denied. Now therefore,

It is hereby ORDERED, ADJUDGED, and DECREED that defendant's motion for a temporary restraining order is denied.

Dated this 2 day of July, 1993.

/s/
UNITED STATES DISTRICT JUDGE

Presented by:
LANE POWELL SPEARS LUBERSKY

By /s/
Robert E. Maloney, Jr., OSB No. 67085
James L. Robart, WSB No. 5333
Attorney for Plaintiff

D - 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 93-481-FR (LEAD)

TEXACO REFINING AND MARKETING INC.,
a Delaware Corporation,

Plaintiff,

v.

BARRY P. DAVIS,

Defendant.

Civil No. 93 - 595-FR

TEXACO REFINING AND MARKETING INC.,
a Delaware Corporation,

Plaintiff,

v.

BARRY P. DAVIS,

Defendant.

Robert E. Maloney, Jr.
James L. Robart
Lane Powell Spears Lubersky
520 S.W. Yamhill Street,
Suite 800
Portland, Oregon 97204-1383

Attorney's for Plaintiff

David S. Shannon
Thomas P. Walsh
Shannon, Johnson & Bailey, P.C.
575 Lloyd Center Tower
825 N.E. Multnomah Street
Portland, Oregon 97232-2154

Attorneys for Defendant

OPINION

FRYE, Judge:

The matters before the court are the motions for summary judgment of Texaco Refining and Marketing, Inc. (Texaco) in its consolidated cases for declaratory judgment against Barry P. Davis (#34 and #74).

UNDISPUTED FACTS

Texaco owns three retail motor fuels stations in the State of Oregon which, until May 23, 1993, had been leased to and operated by Davis. The stations are located in the cities of Salem, Eugene and Clackamas, Oregon.

Texaco sold TEXACO brand motor fuels to Davis pursuant to a separate sales agreement for each retail station. The sales agreements provide Texaco with rights of termination upon the happening of certain events. Under paragraph 22 of the sales agreements, Texaco has the right to terminate the franchises:

> (i) If Purchaser fails to comply with any applicable laws, ordinances, regulations, judicial or administrative orders, or other legal requirements of all governmental authorities, federal, states, municipal or other authority, pertaining to this Agreement and the loading, unloading, storage, transportation and sale of petroleum products;
>
> . . . .
>
> (m) Upon any breach of any of the terms, covenants, warranties, agreements or conditions of this Agreement or any other agreement that may be in effect between the parties;
>
> . . . .
>
> (p) If Purchaser fails to comply with provisions of Paragraph 17, Hours of Operation.

Also provided in each sales agreement is the agreement of the parties that the right of the parties to terminate the sales agreement is both "reasonable and of material significance" to their franchise relationship. Sales Agreements, para. 12.

Texaco and Davis also entered into lease agreements for each station. Under paragraph 12(d) of each lease agreement, Texaco may terminate the lease agreement if Davis "fails to comply with any applicable law, ordinance, regulation, judicial or administrative order, or other legal requirement of any governmental authorities pertaining to this Lease." Paragraph 12 further provides that if Davis breaches any of the condition allowing termination, then such a breach:

> constitutes a failure by [Davis] to comply with a provision of this Lease which is both reasonable and of material significance to the relationship between [Texaco] and [Davis], and shall constitute good cause to cancel or terminate this Lease as the term "good cause" or any similar term is or may be used in any federal or state statute affecting the rights of the parties to terminate this Lease. [Texaco's] rights of termination for good cause as defined above shall not in any way be affected by any previous waiver, forbearance or course of dealing.

In the late fall of 1992, a controversy arose between the parties regarding the hours of operation at the three stations. Davis wanted to close the stations from sundown on Friday nights to sundown on Saturday nights for religious reasons. Texaco maintained that the sales agreements for each station required Davis to keep the stations open for twenty-four hours a day, every day of the year. Davis maintained that Texaco officials, by oral agreement, had promised to allow him to set his own hours of operation.

Beginning January 1, 1993, and each Friday and Saturday thereafter, Davis closed the stations from sundown Friday until

sundown Saturday. Texaco objected to this practice, but the parties were unable to reach an agreement. Texaco then notified Davis in writing that he was in breach of his sales agreements. Davis persisted in closing the stations from sundown Friday until sundown Saturday.

On April 21, 1993, Texaco commenced an action against Davis, *Texaco Refining and Marketing, Inc. v. Davis,* Civil No. 93-481-FR ("the specific performance suit"), seeking a declaratory judgment that the closures of the stations by Davis were in breach of the sales agreements, and seeking an order of the court requiring Davis to keep the stations open in accordance with the agreements. Davis filed an answer containing counterclaims for damages for Texaco's alleged violations of 42 U.S.C. § 1983 and O.R.S. 650.200 *et seq.* Texaco now moves for summary judgment in Civil No. 93-481-FR.

On April 21, 1993, Texaco moved the court for a temporary restraining order restraining Davis from breaching the provisions in his franchise agreements relating to hours of operation. On April 26, 1993, this court granted Texaco's motion and temporarily restrained Davis from closing the stations. Davis defied the court's order and closed the stations from sundown Friday, April 30, 1993, until sundown Saturday, May 1, 1993, in observance of his religious beliefs.

After a hearing held on May 3, 1993, the court granted Texaco's motion for a preliminary injunction enjoining Davis from breaching the provisions of the parties' sales agreements relating to hours of operation. In granting Texaco's motion for a preliminary injunction, the court found: (1) the sales agreements for the stations in the cities of Eugene and Salem required Davis to keep the stations open twenty-four hours a day, seven days a week, and the sales agreement for the station in the City of Clackamas required Davis to keep the station open for twenty-four hours a day, Sunday through Friday; (2) Davis materially breached the sales agreements by closing the stations from

sundown Friday through sundown Saturday; (3) the balance of the hardships favored Texaco, and Davis had no legally justifiable excuse for closing the stations; and (4) the motoring public, other Texaco dealers, and Texaco have been and will continue to be irreparably harmed by the closings.

Davis continued to close the stations from sundown Friday until sundown Saturday, in violation of this court's preliminary injunction. By letter dated May 18, 1993, Texaco gave Davis ten days notice that his franchises would be terminated effective May 28, 1993 at 12:01 a.m. The notices set forth the grounds for termination and included a summary statement of Davis' rights under the Petroleum Marketing Practices Act (PMPA), 15 U.S.C. §§ 2801 *et seq.*.

On May 19, 1993, Texaco commenced a second action against Davis, *Texaco Refining and Marketing, Inc. v. Davis,* Civil No. 93-595-FR ("the declaratory suit"), seeking a judicial declaration that Texaco justifiably terminated the franchises operated by Davis, as well as preliminary and permanent injunctive relief requiring Davis to surrender possession of the stations to Texaco. Davis filed an answer and counterclaim for preliminary and permanent injunctive relief enjoining Texaco from terminating the franchises operated by Davis.

On May 27, 1993, this court denied the motion filed by Davis for an order temporarily restraining Texaco from terminating the franchises. This court based its decision, in part, on Davis' violations of the injunctive orders of the court. After this court denied the motion for a temporary restraining order, and following negotiations between the parties, Davis surrendered possession of the stations to Texaco.

On June 14, 1993, this court granted the motion of Texaco in the specific performance suit for an order adjudging Davis to be in civil contempt for willfully disobeying the temporary restraining order.

CONTENTIONS OF THE PARTIES

Texaco contends that it is entitled to summary judgment because it properly terminated its franchise with Davis under section 2802(b) of the PMPA because Davis violated this court's temporary restraining order and preliminary injunction. Davis contends that Texaco does not have subject matter jurisdiction and asserts several other procedural defenses.

Texaco contends that it is entitled to summary judgment because Davis has surrendered possession of the stations and Texaco has properly terminated the contracts. Davis asserts counterclaims based on 42 U.S.C. § 1983, O.R.S. 650.210(5), and O.R.S. 650.245. Texaco contends that the claim of Davis under 42 U.S.C. § 1983 must fail as a matter of law, and that the claims under the laws of the State of Oregon are moot.

APPLICABLE STANDARD

Summary judgment should be granted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The burden to establish the absence of a material issue of the fact for trial is on the moving party. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). This burden "may be discharged by 'showing' . . . that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*,477 U.S. 317, 323 (1986). The burden shifts to the nonmoving party to "go beyond the pleadings and . . . designate 'specific facts showing that there is a genuine issue for trial.'" *Id.*. at 324.

"The interpretation of a contract is a mixed question of law and fact." *Miller v. Safeco Title Ins. Co.*, 758 F.2d 364, 367 (9th Cir. 1985). When the court's ruling rests on either an analysis of the language of the contract or an application of the principles

of contract interpretation, the decision is one of law, and is therefore appropriate for summary judgment. *See id.*

DISCUSSION

1. The Declaratory Judgment Suit: The Termination of the Franchises Under the PMPA

Texaco contends that it properly terminated its franchises with Davis under section 2802(b)(2) of the PMPA. Section 2802 provides three grounds for termination of a franchisee's contract. The first two grounds are based on failures of the franchisee. Section 2802(b)(2)(A) applies where the franchisee has failed to comply with a provision of the franchise agreement that is both reasonable and of material significance to the franchise relationship. Section 2802 (b)(2)(B) applies where the franchisee has failed to exert good faith efforts to carry out the provisions of the franchise. The third ground, section 2802(b)(2)(C), applies upon the occurrence of an event that is relevant to the franchise relationship and as a result of which termination of the franchise relationship is reasonable.

Each of the three subsections under section 2802 (b)(2) provide an independent basis for termination where the franchisor apprises the franchisee of each statutory subsection it relies upon in its notification of termination. *Khorenian v. Union Oil Co.*, 761 F. 2d 533, 535, n.1 (9th cir. 1985). Texaco contends that it was independently justified in terminating Davis' franchises under each of the three subsections. The court will address these subsections and the defenses raised by Davis to the application of each subsection separately below.

A. 15 U.S.C. § 2802 (b)(2)(A)

Section 2802 (b)(2)(A) provides:

> (2) For purposes of this subsection, the following are grounds for termination of a franchise . . . relationship:

> (A) A failure by the franchisee to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship . . . .

It is uncontroverted that Davis violated the temporary restraining order and preliminary injunction entered by this court. Texaco relies on nearly identical provisions of the sales and lease agreements which provide that Texaco may terminate its agreements if Davis "fails to comply with any . . . judicial . . . orders." Texaco contends that these provisions are "both reasonable and of material significance to the franchise relationship" under section 2802 (b)(2)(A).

A provision is reasonable and material if it "is both conscionable — that is, not absurd, ridiculous, extreme, or excessive — and of real importance or great consequence to the franchise relationship." *Doebereiner v. Sohio Oil Co.*, 880 F.2d 329, 334 (11th Cir. 1989). Section 2802 (b) (2) (A) requires a basic compliance with the law; this expectation is not absurd, ridiculous, extreme or excessive. It is behavior required of all citizens. The breach of a basic trust is material because it undermines the relationship of the parties. Franchisors are "entitled to reasonable expectations of compliance by the franchisee with the provisions of the franchise agreement." *Khorenian*, 761, F.2d at 536. Davis' disregard of this court's authority permanently impaired Texaco's expectation and trust that he would comply with the law and discharge the obligations required by the franchises in the future.

The injunctive orders of the court directly related to the hours of operation at the stations. Several courts have held that provisions providing for hours of operation are reasonable and material and that the failure of a franchisee to comply with such provisions justifies termination under section 2802 (b) (2) (A). *See Doebereiner; Crown Central Petroleum Corp. v. Waldman*, 486 F. Supp. 759 (M.D. Pa. 1980), *reversed and remanded on*

other grounds, 634 F.2d 127 (3d Cir. 1980), *on remand,* 515 F. Supp. 477 (M.D.Pa. 1981), *aff'd,* 676 F.2d 684 (3d Cir. 1982).

Davis argues that termination was improper because his "mere non-compliance" with the terms of the franchise agreements concerning hours of operation does not amount to a "failure to comply" with a provision of the franchise under the PMPA. More specifically, Davis contends that (1) it was beyond his reasonable control to observe the injunctive orders of the court; and (2) the conduct of Texaco was unreasonable when it filed for injunctive relief knowing of his religious beliefs and thereby forcing him to disobey the orders of this court.

ANALYSIS AND RULING

Violation of an order of this court is not "mere non-compliance" but a willful disregard of the law for which Davis was held in civil contempt. Davis stated that he made a "painful choice" to violate the court orders in order to comply with his religious beliefs. However difficult the decision for Davis, he nonetheless chose to willfully violate a judicial order. Unlike the flood which was beyond the reasonable control of the defendant in *Sun Refining and Marketing Co. v. Rago,* 741 F.2d 670 (3d Cir. 1984), Davis acted of his own volition in choosing to disobey the orders of this court.

In denying Davis' motion for a temporary restraining order, this court noted that respect for the judicial process required Davis to comply with the temporary restraining order and preliminary inunction granted in favor of Texaco, even though he thought the orders were wrongly issued. The United States Supreme Court held that "persons subject to an injunctive order issued by a court with jurisdiction are expected to obey that decree until it is modified or reversed, even if they have proper grounds to object to the order." *GTE Sylvania, Inc. v. Consumers Union of United States, Inc.,* 445 U.S. 375, 386 (1980).

Davis claims that he did not make what he describes as a "painful choice" to violate the injunction of his own volition, but rather that Texaco forced him to disobey the order of the court by filing for injunctive relief. This argument is without merit. Texaco had a right to seek judicial redress under the terms of the franchise agreements and the PMPA.

The charges made by Davis regarding Texaco's bad faith are irrelevant because the terminations of the franchise agreements were based on his conduct alone. Several courts have held "assertions as to improper motive or bad faith by the franchisor to be irrelevant in evaluating the propriety of the termination or nonrenewal where the termination or nonrenewal is based on conduct by the franchisee." *Glenside West Corp. v. Exxon Co., U.S.A., Div. of Exxon Corp.*, 761 F. Supp. 1100, 1109 (D.N.J. 1991) (*citing Smoot v. Mobil Oil Corp.*, 772 F. Supp. 849, 857 (D.Mass. 1989)) and *Crown Central Petroleum Corp., v. Waldman,* 515 F. Supp. 477, 485 (M.D. Pa. 1981), *aff'd without op.*, 676 F.2d 684 (3d Cir. 1982).

By violating the orders of the court, Davis breached provisions of the franchise agreements that are reasonable and of material significance to the franchises under section 2802 (b) (2) (A).

B. 15 U.S.C. § 2802 (b)(2)(B)

Section 2802 (b)(2)(B) provides:

> (2) For purposes of this subsection, the following are grounds for termination of a franchise . . . relationship:
>
> . . . .
>
> (B) A failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise, if —

> (i) the franchisee was apprised by the franchisor in writing of such failure and was afforded a reasonable opportunity to exert good faith efforts to carry out such provisions.

Texaco contends that Davis failed to exert any effort whatsoever, much less a good faith effort, to carry out the provisions of his contracts with Texaco that relate to hours of operation. It is uncontroverted that Davis publicly declared his intent to violate the temporary restraining order and preliminary injunction entered by this court and that he carried out his intent.

Davis argues, nonetheless, that Texaco's termination of the franchises was improper under section 2802(b) (2) (B) because (1) Texaco has failed to show Davis' lack of good faith in light of his religious beliefs; (2) the cases cited by Texaco are distinguishable because here there is uncertainty regarding the terms of the franchise agreements and because Davis' religious beliefs are at issue; and (3) it is unclear whether the parties intended that a violation of any court order would trigger Texaco's right to terminate the franchises.

In *Mobil Oil Corp. v. Karbowski,* 879 F. 2d 1052 (2d Cir. 1989), the Second Circuit held that where the franchisee informed the franchisor that he had no intention of complying with a contract provision which required twenty-four hour a day, seven day a week operation, no factual dispute existed regarding the franchisee's good faith under section 2802 (b) (2) (B). Similarly, in *Lyons v. Mobil Oil Corp.,* 884 F.2d 1546, 1550 (2d Cir. 1989), the Second Circuit affirmed summary judgment for the franchisor and stated: "Section 2802 (b) (2) (B) requires not good faith in a franchisee's heart and mind while breaching the agreement but good faith in attempting to comply with it. Good faith in non-compliance is, therefore, simply not enough . . . "

This court does not question the conviction with which Davis holds his religious beliefs. But, as in *Karbowski* and

Lyons, Davis' good faith in not complying with the orders of the court is not enough. The fact that Davis was motivated by religious beliefs when he violated the orders of the court is not sufficient to raise a question of fact.

The argument of Davis that the provision in his contracts relating to hours of operation is ambiguous and, therefore, he need not have complied with an order of the court relating to that provision is misguided. Davis claims that the relevance of the court's orders to the operations of the stations is dependent upon a finding that he breached the hours of operation section. This is a mistaken assumption. The court made a determination that Davis violated the provisions in the temporary restraining order and the preliminary injunction relating to hours of operation. However, the provisions relating to hours of operation are not what Texaco bases its right to terminate the contracts upon. The termination of the contracts by Texaco is based solely upon Davis' failure to comply with the orders of this court. Therefore, any ambiguity in the provisions in his contracts relating to hours of operation has no relevance at this time.

The final argument of Davis is that his failure to comply with the provisions relating to hours of operation upon which Texaco bases its claim does not apply to any judicial order, but only pertains to certain petroleum-related activities. Paragraph 22(i) of the sales agreements provides: "If Purchasers fails to comply with any applicable laws, ordinances, regulations, judicial or administrative orders, or other legal requirements of all governmental authorities . . . *pertaining to this Agreement* . . . ." (Emphasis added.) This final argument has no merit.

Davis has not demonstrated the existence of any material factual issues with respect to Texaco's breach of contract claim under section 2802 (b)(2)(B).

C. 15 U.S.C. § 2802 (b)(2)(C)

Section 2802 (b)(2)(C) provides:

> (2) For purposes of this subsection, the following are grounds for termination of a franchise . . . relationship:
>
> . . . .
>
> (C) The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise . . . relationship is reasonable, if such event occurs during the period the franchise is in effect and the franchisor first acquired actual or constructive knowledge of such occurrence —
>
> . . .
>
> (ii) not more than 60 days prior to the date on which notification of termination . . . is given, if less that 90 days notification is given pursuant to section 2804 (b) (1) of this title.

Texaco argues that the failure of Davis to comply with the orders of the court is an event relevant to the franchise relationship and for which termination was reasonable. Davis argues that termination based on section 2802 (b) (2) (C) is improper because violation of a court order is not an enumerated "event" under this section, and that it is not similar to an enumerated "event."

Section 2802(c) contains a non-exclusive list of relevant events justifying termination. *Russo v. Texaco, Inc.*, 808 F.2d 221, 225 (2d Cir. 1986). This illustrative list includes the "knowing failure of the franchisee to comply with Federal, State, or local laws, or regulations relevant to the operation of the marketing premises." 15 U.S.C. § 2802 (c)(11). In *Russo*, the court held that the occurrence of an event that is similar to an

enumerated event may support termination under section 2802 (c). *Russo,* 808 F.2d at 225 (quoting S.Rep. No. 731, 95th Cong., 2d Ses. 38, *reprinted in* 1978 U.S. Code Cong. & Ad. News at 896).

The court finds that Davis' violations of the temporary restraining order and the preliminary injunction are, at a minimum, similar to the "failure to comply with Federal, State, or local laws" enumerated by the statute. Davis has not raised an issue of material fact with regard to Texaco's section 2802 (b)(2)(C) claim.

2. Defense of Lack of Subject Matter Jurisdiction

Davis contends that this court lacks subject matter jurisdiction under the PMPA to adjudicate Texaco's claim for declaratory relief, citing *Winks v. Feeney Oil Co.,* 731 F. Supp. 322 (C.D. Ill. 1990); *CIA. Petrolera Caribe, Inc. v. De Jesus,* 671 F. Supp. 884 (D.P.R. 1987). Davis argues that the language of the PMPA, the legislative history, and the relevant case law support the conclusion that this court lacks jurisdiction.

It is well established that federal question jurisdiction exists in declaratory judgment actions where the plaintiff's action anticipates the defendant's federal question claims. *Morongo Band of Mission Indians v. California State Bd. of Equalization,* 858 F. 2d 1376, 1384 (9th Cir. 1988), *cert. denied, Miller v. Morongo Bank of Mission Indians,* 488 U.S. 1006 (1989) (citing *Bell & Beckwith v. United States,* 766 F.2d 910 (6th Cir. 1985), *see also* 10A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 2767 (2d ed. 1983). The Ninth Circuit stated in *Morongo:*

> In an interpleader action, as in an action for declaratory relief the plaintiff seeks an adjudication of claims that the defendants threaten to assert against the plaintiff. Whether the action is styled as one for interpleader or for declaratory relief, the cause of

> action litigated is not that of the plaintiff but that of the defendants. Federal jurisdiction over both types of actions is proper if the cause(s) of action anticipated by the plaintiff's suit would arise under federal law.

858 F.2d at 1384 (citations omitted).

Two cases upon which Davis relies, *Winks,* and *CIA. Petrolera Caribe, Inc.,* interpret the wording of section 2805 (a) of the PMPA to provide a cause of action exclusive to the franchisee alone. Section 2805(a) provides that "[i]f a franchisor fails to comply with the requirements of section 2802 or 2803 of this title, the franchisee may maintain a civil action against such franchisor." While the PMPA does not expressly provide that the franchisor may bring suit, section 2805 (a) does not contain language prohibiting the franchisor from maintaining a civil action against the franchisee. The cases cited by Davis focus narrowly on this language. The wealth of authority is contrary. Courts in numerous other cases have recognized federal question jurisdiction in declaratory judgment actions filed by franchisors seeking a determination that they properly terminated a franchisee under the PMPA.[1] This court will follow the weight of authority on this issue.

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[1] *See Chevron U.S.A., Inc. v. Finn,* 851 F. 2d 1227, 1230-31 (9th Cir. 1988), *cert. denied, Finn v. Chevron U.S.A., Inc.,* 489 U.S. 1054 (1989); *Mobil Oil Corp. v. Karbowski,* 879 F.2d 1052 (2d Cir. 1989); *Amoco Oil Co. v. Johnstone,* 856 F.2d 967 (7th Cir. 1988), *cert. denied, Johnstone v. Amoco Oil Co.,* 490 U.S. 1046 (1989); *Sun Refining and Marketing Co. v. Rago,* 741 F.2d 670, 671 n. 3 (3d Cir. 1984); *Murphy Oil USA, Inc. v. Hauser,* 820 F. Supp. 437 (D.Minn. 1993); *Shell Oil Co. v. Hillary Farmer Serv. Station, Inc.,* 739 F. Supp. 749, 755 (E.D.N.Y. 1990); *Marathon Petroleum Co. v. Pendleton,* 689 F. Supp. 739, 741-42 (N.D. Ohio 1988), *aff'd* 889 F.2d 1509, 1513 (6th Cir. 1989); *Mobil Oil Corp. v. Shah,* 671 F. Supp. 503 (N.D. Ill. 1987); *Mobil Oil Corp. v. Vachon,* 580 F. Supp.114 (N.D. Ohio 1983); *Exxon Corp. v. Miro,* 555 F. Supp. 234 (C.D. Cal. 1983).

3. Procedural Defenses

Davis raises the following procedural defenses which he argues preclude the court from granting summary judgment on Texaco's claim for declaratory relief and the counterclaim of Davis for injunctive relief: (1) Texaco failed to reply to his counterclaim; (2) Texaco's motion is premature and should be denied until discovery is completed; (3) a material question of fact exists regarding the propriety of Texaco's notice of termination; and (4) a material question of fact exists as to whether Texaco provided Davis with a notice of termination at the earliest date reasonably practicable. These defenses will be addressed separately.

First, Davis is mistaken in his claim that Texaco failed to answer his counterclaim. Texaco served and filed its answer to Davis' counterclaim on June 15, 1993.

Second, Davis argues that discovery is necessary to determine the nature of the agreements of the parties regarding the contractual provisions for hours of operation. The court need not reach the issue of whether Davis breached the provisions relating to hours of operation in this action because Texaco bases its right of termination on the failure of Davis to comply with a judicial order relating to the contracts.

Third, Davis argues that section 2804 required Texaco to give him 90 days notice of termination, and that less than 90 days notice may be given only where a franchisee has committed serious breaches of the franchise agreement. He argues that whether a notice given less than 90 days prior to termination is a serious default is a question of fact to be decided by a jury, citing *Union Oil Co. v. O'Reily,* 226 Cal. App. 3d 199, 276 Cal. Rptr. 483 (1990), *cert. denied,* ___ U.S. ___, 112 S.Ct. 75 (1991), and *Naff v. Standard Oil Co.,* 527 F. Suppl. 160 (S.D. Ohio 1981).

The court need not reach the factual issue of whether Davis' breach is a "serious default" justifying less than 90 days notice because less than 90 days notice is also permissible under section 2804 (b)(1)(A) if it is reasonable under the circumstances. *Abujudeh v. Mobil Oil Corp.*, 841 F.2d 310 (9th Cir. 1988), and *Wisser Co. v. Mobil Oil Corp.*, 730 F.2d 54 (2d Cir. 1984). The reasonableness of providing less than 90 days notice of termination, like any question of fact, may be decided as a matter of law where reasonable minds can reach but one conclusion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Several courts have determined as a matter of law that substantially less than 90 days notice was reasonable under the circumstances. *See, e.g., Abujudeh, supra,* (12 days notice); *Marathon Petroleum Co. v. Pendleton,* 889 F.2d 1509, 1513 (6th Cir. 1989) (10 days notice); *Wisser, supra*, 730 F.2d at 60 (immediate termination); and *Shell Oil Co. v. Wentworth,* 822 F. Supp. 878, 883 (D. Conn. 1993) (7 days notice).

This court concludes that Texaco acted reasonably in providing less than 90 days notice to Davis. Davis declared in open court that he would not comply with the orders of the court and was held in civil contempt. Thus, had Texaco provided the full 90 days notice, the irreparable harm to the motoring public would have continued throughout the notice period.

In his last procedural defense, Davis argues that Texaco did not provide him with a notice of termination on the earliest date practicable. Davis asserts that January 1, 1993, when he first closed the stations contrary to the terms of his contracts with Texaco, was the earliest date reasonably practicable for Texaco to provide him with a notice of termination. As previously discussed at length, the pivotal issue giving rise to the termination of Davis' franchises was his failure to comply with the orders of the court. Texaco obtained the temporary restraining order and the preliminary injunction and gave Davis a reasonable opportunity to comply with the orders of the court. Twenty-

two days after the entry of the temporary restraining order and fifteen days after the entry of the preliminary injunction, Texaco issued its notice of termination. The court concludes that Texaco waited a reasonable period of time to determine Davis' non-compliance before terminating his franchises.

4. The Specific Performance Suit: Davis' Counterclaims

A. Counterclaim Based on 42 U.S.C. § 1983

Texaco argues that summary judgment is appropriate on one civil rights counterclaim filed by Davis because, as a matter of law, Davis has not stated a viable claim under 42 U.S.C. § 1983; and even if he had, the claim is moot. The basis of Davis' claim under 42 U.S.C. § 1983 is that Texaco used the enforcement mechanisms of the court to compel specific performance of the franchise agreements in order to purposefully infringe on Davis' right of free exercise of religion and his right to be free from involuntary servitude. Davis alleges that he has suffered damages as a result of having to make the decision not to comply with the injunctive order of the court.

To state a claim under section 1983, Davis must prove both (1) that he was deprived of a right secured by the constitution or the laws of the United States, and (2) that Texaco acted under color of state law. *Collins v. Womancare*, 878 F.2d 1145, 1147 (9th Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990).

Davis contends that Texaco acted under color of state law by using the enforcement mechanisms of the federal courts. In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982), the Court held "that the conduct allegedly causing the deprivation of a federal right [must] be fairly attributable to the State." *See also District of Columbia v. Carter*, 409 U.S. 418, 424-25 (1973). Ninth Circuit decisions have held that federal action allegedly causing the deprivation of a federal right is insufficient under 42 U.S.C. § 1983. *Daly-Murphy v. Winston*, 820 F.2d

1470, 1477 (9th Cir. 1987), *amended,* 837 F.2d 348 (9th Cir. 1987). A federal court may apply a state law, but it does not act under color of state law. *Wheeldin v. Wheeler,* 373 U.S. 647, 650 n. 2 (1963).

Davis cites *Cohen v. Cowles Media Co.,* ___ U.S. ___, 111 S.Ct. 2513 (1991) to support his argument. His reliance on this case is misplaced. As the *Cohen* Court noted: "Our cases teach that the application of state rules of law in state courts . . . constitutes 'state action' under the Fourteenth Amendment." *Id.* at 2517 (emphasis added). Davis also cites *Edmonson v. Leesville Concrete Co.,* ___ U.S. ___, 111 S.Ct. 2077 (1991). *Edmonson* did not have a claim under section 1983, but an equal protection claim under the Fifth Amendment. Under the Fifth Amendment, the "state actor" is the federal government; under the fourteenth amendment the "state actor" is state government. *Carter, supra,* 409 U.S. at 423-24.

The "acting under color of state law" requirement is satisfied only when "the state courts, supported by the full panoply of state power," are used to deprive an individual of constitutional rights. *Shelley v. Kraemer,* 334 U.S. 1, 19 (1948). Texaco did not pursue its claim in state court. No state action was involved in this case. The section 1983 claim of Davis fails as a matter of law.

The court does not need to reach the issue of mootness because Davis has not satisfied the *prima facie* requirements under section 1983.

B. The Counterclaims of Davis Based on O.R.S. 650.210(5) and O.R.S. 650.245

Davis has alleged two counterclaims to the specific performance suit based on the laws of the State of Oregon. O.R.S. 650.210 provides, in relevant part:

> It shall be unlawful and a violation of ORS 650.200 to 650.250 for any franchisor to:

. . . .

> (5) Impose on a franchisee by contract, rule or regulation, whether written or oral, any standard of conduct unless the person so doing can sustain the burden of proving the standard of conduct to be reasonable.

O.R.S. 650.245 provides:

> Principle of good faith. Without limiting the other provisions of ORS 650.200 to 650.250, the principle of good faith shall govern the relationship and dealings of the parties with each other.

Texaco contends that Davis' counterclaims under O.R.S. 650.210(5) and O.R.S. 650.245 are moot because Texaco properly terminated the contracts based on Davis' violation of the orders of the court, and Davis has surrendered the facility to Texaco. Texaco is no longer attempting to enforce the provisions relating to hours of operation. Davis argues that the counterclaims are not moot because he has viable damage claims against Texaco.

A claim is moot where there no longer exists a present controversy as to which effective relief can be granted. *United States v. Geophysical Corp. of Alaska,* 732 F.2d 693, 698 (9th Cir. 1984). Because Texaco properly terminated Davis under the PMPA and because Davis no longer operates the stations there can be no controversy in this case as to the provisions relating to the hours of operation. This court cannot fashion a remedy for Davis. Therefore, the claims of Davis for any alleged violations of the statutes after termination on May 28, 1993 are moot.

Davis argues that his claims are not moot. He relies upon the doctrine of collateral legal consequences, citing *Koppers Indus. v. United States EPA*, 902 F.2d 756, 758 (9th Cir. 1990).

The doctrine of collateral legal consequences is an exception to the rule that a court will not hear an appeal that is moot. *Id.* However, the doctrine of collateral legal consequences applies only to determinations by appellate courts as to when to hear claims.

Davis further contends that his counterclaims cannot be adjudged moot prior to a determination as to the terms of the franchise agreements and the appropriateness of the preliminary injunction. The counterclaims filed by Davis under the laws of the State of Oregon do not arise from and are not dependent on whether the preliminary injunction is overturned on appeal. As discussed above, Texaco properly terminated the franchises because Davis violated the orders of this court. The fact that the orders can be overturned on appeal is irrelevant.

Davis argues that even if his claims are moot as to the pre-termination period, his claims as to the post-termination period should not be dismissed on a motion for summary judgment because the issues relating to the damages caused by the terminations must be resolved. It is undisputed that Davis did not comply with Texaco's demands that he operate the stations twenty-four hours a day, seven days a week as required by the contracts. Therefore, Davis cannot point to any damages resulting from Texaco's conduct.

Nonetheless, Davis claims that he is entitled to damages for the emotional distress arising from his decision to refuse to comply with the orders of the court. Davis did not plead a counterclaim based on intentional infliction of emotional distress; therefore, he cannot be entitled to damages under that doctrine.

Davis also claims that he suffered damages relating to the bond required for the preliminary injunction. Davis would only have a claim against the bond if the Ninth Circuit or the Supreme Court determined that the preliminary injunction was wrongly issued, and that Davis sustained damages as a result of his

compliance with the injunction. *See* Fed. R. Civ. P. 65 (c); *Amalgamated Transit Union, etc. v. Greyhound Lines, Inc.*, 529 F.2d 1073, 1079 (9th Cir.), *vacated on other grounds*, 429 U.S. 807 (9176), *on remand*, 550 F.2d 1237 (9th Cir. 1977). Since Davis did not comply with the injunction, he has no claim against the bond.

CONCLUSION

Texaco's motion for summary judgment in the declaratory suit (#34) is granted.

Texaco's action for specific performance of the provision of the franchise agreements relating to hours of operation is moot because Davis no longer operates the stations, and Texaco properly terminated the franchise agreements. Based on the reasons discussed above, Davis' counterclaims to the action for specific performance based on 42 U.S.C. § 1983, O.R.S. 650.210(5), and O.R.S. 650.245 are deemed moot. Therefore, Texaco's motion for summary judgment in the specific performance suit (#74) is granted.

DATED this 20 day of October, 1993.

/s/

Helen J. Frye
United States District Judge

D - 23

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 93-481-FR (LEAD)

TEXACO REFINING AND MARKETING INC.,
a Delaware corporation,

Plaintiff,

v.

BARRY P. DAVIS,

Defendant.

Civil No. 93-595-FR

TEXACO REFINING AND MARKETING INC.,
a Delaware corporation,

Plaintiff,

v.

BARRY P. DAVIS,

Defendant.

IT IS HEREBY ORDERED that the motions of Texaco Refining and Marketing, Inc. for summary judgment (#34 and #74) are GRANTED.

DATED this 20 day of October, 1993.

/s/
Helen J. Frye
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

TEXACO REFINING AND MARKETING, INC.,
a Delaware corporation
Plaintiff-Appellee,

v.

BARRY P. DAVIS,
Defendant-Appellant.

No. 93-35466,
93-35589,
93-36101
D. C. No. CV-93-595-FR
CV-93-481-FR

*** MEMORANDUM**

Appeal from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, Presiding
Argued and Submitted November 1, 1994
Portland, Oregon

Filed December 29, 1994

Before: FLETCHER, D.W. NELSON, and RYMER, Circuit Judges

Barry Davis, a former franchisee of three gasoline stations franchised to him by Texaco Refining and Marketing, Inc. ("Texaco"), appeals the district court's grant of Texaco's motion for summary judgment in its action to terminate its franchise

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

relationship with Davis. We have jurisdiction and affirm. We dismiss Davis's other appeals as moot.

I

Prior to May, 1993, Davis was the franchisee of three Texaco service stations in Salem, Eugene, and Clackamas, Oregon. Each of the stations operated under a separate franchise agreement between Texaco and Davis. Although the franchise agreement for the Eugene station expressly required operation of the station twenty-four hours a day, seven days a week, the Clackamas and Salem agreements did not. Nevertheless, Davis had been operating all of the stations on a twenty-four hours a day, seven days a week basis for several years prior to the events leading to this appeal.

In October, 1992, Davis wrote a letter to Texaco representatives requesting that he be permitted as of January 1, 1993 to close his stations for the Sabbath, from sundown on Friday to sundown on Saturday, due to changes in his religious beliefs. Texaco took the position that Davis was required to operate all of his stations on a twenty-four hours a day, seven days a week basis and denied Davis's request. Although Davis and representatives from Texaco met several times throughout the remainder of 1992, their attempts to reach agreement were unsuccessful.

Commencing January 1, Davis closed his stations each Sabbath. After sending Davis at least four written warnings that the closures violated his agreements with Texaco and placed his franchises at risk of termination, Texaco brought suit in district court for specific performance of the parties' franchise agreements, which it claimed required twenty-four hours a day, seven days a week operation of all three stations. The district court issued a preliminary injunction requiring Davis to keep his stations open twenty-four hours a day, seven days a week. Davis

sought a stay of the preliminary injunction, but the district Court denied his motion.

After Davis disobeyed the preliminary injunction by closing his gas stations on Friday night and Saturday on the following two weekends, Texaco notified Davis on May 18, 1993 that his franchises would be terminated ten days later due to his violations of the franchise agreements and the preliminary injunction. On May 19, Texaco commenced an action for declaratory judgment that its termination of the franchises was proper and for an injunction requiring Davis to surrender his stations to Texaco. The district court rejected Davis's motion for an order temporarily restraining the termination and granted Texaco's motion for summary judgment. The court held that Davis's noncompliance with the preliminary injunction justified Texaco's termination of the franchises as a matter of law because it constituted a violation of a provision in his franchise agreements that he obey all applicable judicial orders. During the same proceeding, the district court dismissed Davis's counterclaims to Texaco's prior suit for specific enforcement. The court dismissed two of the counterclaims as moot and dismissed the third counterclaim for failure to state a claim.

The various decisions made by the district court have resulted in the three appeals consolidated before us. In the "core" appeal, Davis argues that termination of his franchises violated the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§ 2801-2841, and that the district court erred by dismissing his counterclaims to Texaco's prior suit for specific enforcement. In separate appeals, Davis also appeals the district court's denial of his motion for an order temporarily restraining the terminations and the district court's grant of the preliminary injunction requiring him to operate his stations on a twenty-four hours a day, seven days a week basis.

II

The PMPA prohibits the termination of a franchise unless the franchisor complies with the Act's notice requirements and terminates for reasons enumerated by the Act. Davis maintains that Texaco's termination was without sufficient notice and without adequate grounds.

A

Although section 2804(a)(2) of the PMPA requires a franchisor generally to give a franchisee ninety days notice of termination, Texaco provided Davis only ten days notice. However, we conclude that the district court did not err in finding that requiring ninety days notice in this case would not have been reasonable and, therefore, under an exception to section 2804(a)(2), Texaco was required only to give notice when "reasonably practicable." 15 U.S.C. § 2804(b)(1); *see also Abujudeh v. Mobil Oil Corp.*, 841 F.2d 310, 311-12 (9th Cir. 1988) (interpreting § 2804(b)(1)).

Texaco submitted evidence establishing that Davis's noncompliance with the preliminary injunction during the ninety day notice period would have subjected Texaco to mounting lost profits and loss of goodwill. *See Marathon Petroleum Co. v. Pendleton*, 889 F.2d 1509, 1512 (6th Cir. 1989) (less than ninety days notice reasonable when franchisee had declining interest in operating station and was failing to maintain adequate gasoline supplies). Although Texaco had several months notice that Davis intended to,close his stations for twenty-four hours on the weekends, what the district court called the "pivotal issue giving rise to the termination" did not occur until Texaco had obtained the preliminary injunction and Davis refused to comply with it. Requiring Texaco to seek termination as soon as its relationship with Davis became problematic would undermine the purpose of the PMPA to protect station operators from arbitrary termination. *See DuFresne's Auto Service, Inc. v.*

Shell Oil Co., 992 F.2d 920, 925 (9th Cir. 1993) (discussing congressional intent behind PMPA); *see also Nassau Blvd. Shell Service Station, Inc. v. Shell Oil Co.*, 875 F.2d 359, 362-63 (2d Cir. 1989) (requiring franchisor to initiate termination "as soon as [it] hears an allegation against a franchisee [would be] at odds with the congressional intent in promulgating the PMPA"); *Desfosses v. Wallace Energy, Inc.*, 836 F.2d 22, 29 (lst Cir. 1987) (franchisor "entitled to a reasonable time to evaluate the need for termination"). Under the circumstances, Texaco provided notice as soon as reasonably practicable.

B

As the franchisor, Texaco bears the burden of proving that grounds existed for terminating its relationship with Davis. 15 U.S.C. § 2805(c). We hold that Texaco has met its burden as a matter of law. Under section 2802(b)(2) (A) of the PMPA, a franchisor may terminate if the franchisee fails to "comply with any provision of the franchise" that "is both reasonable and of material significance to the franchise relationship."[1] Texaco terminated its relationship with Davis because he violated a provision in his sales and lease agreements with Texaco requiring in part that he obey "any applicable . . . judicial . . . orders." Davis admits that he did not comply with the district court's order that he keep his stations open twenty-four hours a day.

Davis contends, though, that the preliminary injunction "was improvidently issued" and cannot be material to the fran-

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[1] The district court also found grounds for termination under section 2802 (b) (2) (B), which provides for termination if the franchisee fails to "exert good faith efforts to carry out the provisions of the franchise," and under section 2802(b)(2)(C), which provides for termination upon the "occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise . . . is reasonable." Because we find that termination was appropriate under section 2802(b)(2)(A)l we do not address whether termination would be justified under these other provisions.

chise relationship. He argues that the district court should not have issued the preliminary injunction because Texaco had failed to show a likelihood of success on the merits in its suit for specific performance and because the balance of harms favored Davis. Even if the preliminary injunction otherwise was properly issued, he argues, it violated the First Amendment by requiring him to violate his religious beliefs.

We decline Davis's invitation to review the propriety of the preliminary injunction. Termination was based on Davis's violation of a contract provision that has nothing to do with religion; it simply requires him to comply with judicial orders. Davis's conduct in the face of a binding judicial order impaired Texaco's expectation that he would comply with the law and discharge his obligations to the franchise. *See Khorenian v. Union Oil Co.*, 761 F.2d 533, 536 (9th Cir. 1985) (franchisors are "entitled to reasonable expectations of compliance by the franchisee with the provisions of the franchise agreement"). Moreover this particular injunction pertained to Davis's work hours, a provision included in the parties' agreements. Under these circumstances, the requirement that Davis comply with judicial orders was reasonable and material to the franchise relationship, and Davis's breach of this contract provision constituted grounds for termination under the PMPA, regardless of the validity of the district court's order.[2] *Cf. Lewis v. Exxon Corp.*, 716 F.2d 1398, 1399-1400 (D.C. Cir. 1983) (basis of termination under section 2802(c)(12) of the PMPA is fact of felony conviction, not the conviction's validity).

Davis maintains that, even if valid grounds for termination existed, termination nevertheless was inappropriate because Texaco invoked these grounds as a pretext to retaliate against him for "vigorously and publicly defending his constitutional

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[2] For identical reasons, the district court properly ignored defendant's affirmative defenses, which were based on the alleged unconstitutionality of the preliminary injunction.

rights." Although a franchisee may rebut a franchisor's grounds for termination by producing evidence that the termination was based on illegitimate considerations, *see Reyes v. Atlantic Richfield Co.*, 12 F.3d 1464, 1469-70 (9th Cir. 1993), Davis has failed to produce any evidence suggesting a retaliatory motive. The fact that Texaco did not resort to the courts until four months after Davis began closing his stations on Saturday does not, as Davis maintains, "belie a hidden agenda." This allegation alone does not raise a genuine issue of material fact regarding a retaliatory motive.

III

Davis appeals the district court's order of summary judgment in favor of Texaco in his counterclaims to Texaco's action for specific enforcement. In response to Texaco's action for specific performance, Davis brought three counterclaims against Texaco. In two of these, Davis argued that Texaco's attempt to keep his service stations open twenty-four hours a day, seven days a week was a bad faith attempt to impose an unreasonable standard of conduct and therefore violated Oregon's statutory law governing motor fuel franchises. *See* O.R.S. §§ 650.210(5) and 650.245.[3]

Davis also pursued a counterclaim against Texaco under 42 U.S.C. § 1983, arguing that Texaco had acted under color of state law to deprive him of a federally protected right by resorting to the courts to require him to work on the Sabbath in violation of his religious beliefs.

We hold that Davis's counterclaims were properly dismissed.

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[3] O.R.S. § 650.210 prohibits a franchisor from imposing a contract, rule, or regulation upon a franchisee unless it can sustain the burden of proving the standard of conduct to be reasonable. O.R.S. § 650.245 requires that the principle of good faith must govern the franchise relationship.

A

We agree with the district court that Davis's state law counterclaims are moot because relief is no longer available. Because Davis does not still operate the service stations, he cannot obtain injunctive relief from a twenty-four hours a day, seven days a week schedule of operation. Furthermore, Davis has no claim to damages from being forced to work on the Sabbath in violation of his religious beliefs because Davis never complied with Texaco's demand that he do so.

Davis contends that he retains viable claim for damages resulting from the loss of his service stations in the termination action because if Texaco had not sought to obtain a preliminary injunction requiring him to keep his stations open on the Sabbath, the district court would not have granted the preliminary injunction, he would not have disobeyed it, and his franchise relationship would not have been terminated. We reject his "but for" analysis. Although Texaco's request for a preliminary injunction may have set in motion the chain of events eventually leading to Davis's termination, the reason for termination was Davis's violation of a provision of his franchise agreements requiring him to comply with judicial orders. We fail to see how Davis can recover damages under state law for a termination that was lawful under the PMPA. *See* 15 U.S.C. § 2806(a) (PMPA preempts state law "with respect to termination"); *Simmons v. Mobil Oil Corp.*, 29 F.3d 505, 511 (9th Cir. 1994); *In re Herbert*, 806 F.2d 889, 892 (9th Cir. 1986).

We also reject Davis's contention that, in a suit to enforce Oregon's statutory law governing motor fuel franchises, he may recover damages for the emotional pain he suffered from being forced to choose between obeying the court or obeying God. Under Oregon law, damages for emotional or psychic injury are not recoverable in contract. *See, e.g., Hammond v. Central Lane Communications*, 816 P.2d 593, 597 (Or. 1991); *Keltner v.*

Washington County, 800 P.2d 752, 756-58 (Or. 1990). Moreover, absent an affirmative indication that the legislature intended to expand the scope of available remedies, Oregon's courts have refused to hold that a violation of a state statute governing contractual relationships constitutes a tort entitling a plaintiff to recover for emotional distress. *See Farris v. United States Fid. & Guar. Co.*, 587 P.2d 1015, 1018 (Or. 1978) (addressing state statute requiring insurer to make good faith attempt to settle claims promptly and equitably).

Because Davis could not obtain effective relief even if he proved that Texaco violated Oregon law governing motor fuel franchises, his state law counterclaims were properly dismissed as moot.

B

We also agree that the district court properly dismissed Davis's counterclaim under 42 U.S.C. § 1983 for failure to state a claim. To state a claim under section 1983, Davis must show that Texaco acted under color of state law and deprived Davis of a federal right by obtaining from the district court a preliminary injunction requiring him to operate his stations twenty-four hours a day, seven days a week. To be considered "under color of state law," a private actor's conduct must be "fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). Even if Texaco could have been considered as acting under color of state law had it employed Oregon's state courts to obtain specific performance, here Texaco used the enforcement mechanisms of a federal district court. Because federal action is not actionable under section 1983, *Wheeldin v. Wheeler*, 373 U.S. 647, 650 n.2 (1963); *Dale-Murphy v. Winston*, 837 F.2d 348, 355 (9th Cir. 1987), the district court properly dismissed Davis's section 1983 counterclaim.[4]

[4] Davis's reliance on *Shelley v. Kraemer*, 334 U.S. 1 (1948), *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), and *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), lacks merit. *Cohen* and *Shelley* both involved

IV

In addition to his appeal from summary judgment in Texaco's suit for termination, Davis appeals the district court's denial of his request for an order temporarily restraining the termination and the district court's preliminary injunction requiring him to keep his stations open twenty-four hours a day. We dismiss both appeals as moot.

Because we have affirmed the district court's summary judgment in favor of Texaco approving termination of the franchises, reversal or denial of the district court's orders regarding injunctive relief would have no practical effect. *See Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1450 (9th Cir. 1992). Moreover, no "collateral consequences" keep Davis's appeals alive. Davis cannot maintain an action against Texaco for damages because Texaco's termination of its relationship with Davis was lawful under the PMPA. Although Davis maintains that he also has a claim for attorney's fees, see 15 U.S.C. § 2805(d) (attorney's fees to franchisee who prevails in request for TRO), this claim alone cannot revive a moot issue. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990) ("interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim"); *United States v. Ford*, 650 F.2d 1141, 1143 (9th Cir. 1981) ("a claim for attorney's fees does not preserve a case which otherwise has become moot on appeal"), *cert. denied*, 455 U.S. 942 (1982); *cf. Furniture Moving Drivers v. Crowley*, 467 U.S. 526, 535, n.11 (1984) ("*several important collateral matters*, including claims for damages, attorney's fees, and costs" presented a live controversy) (emphasis added).

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private use of the state courts, and *Edmonson* involved an equal protection claim under the Fifth Amendment where the "state actor" is the federal government.

V

Davis's appeals of the district court's grant of Texaco's motion for a preliminary injunction and of the district court's denial of his motion for an order temporarily restraining Texaco's termination of his franchises are dismissed as moot. We affirm the district court's grant of Texaco's motion for summary judgment on all claims.

AFFIRMED.